No. 2824

In the

United States Circuit Court of Appeals

for the Ninth Circuit

M. P. FREEMAN, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation,

Appellant,

vs.

JOHN H. MARTIN, Trustee in Bankruptcy of Imperial Copper Company, a corporation,

Appellee.

BRIEF FOR M. P. FREEMAN, TRUSTEE, ETC., APPELLANT.

SELIM M. FRANKLIN and
ELLINWOOD & ROSS,
Attornies for M. P. Freeman. Trustee, Etc., Appellant.

INDEX TO BRIEF OF APPELLANT

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STATEMENT OF THE CASE.

This is an action brought by John H. Martin, as Trustee in Bankruptcy of Imperial Copper Company, a corporation, bankrupt, against M. P. Freeman, as Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, bankrupt, to determine the ownership

and right of possession of some ten thousand tons of flue dust and many thousand tons of slag, being the residue or by-product of many thousands of tons of copper ore, shipped by the Imperial Copper Company in the years 1908, 1909 and 1910, to the Southern Arizona Smelting Company, and which ores were by the Smelting Company, in said years, smelted in its furnaces and reduced to copper bullion. The bullion was sold by the Smelting Company, and the ores from which the bullion was produced, have been paid for by the Smelting Company to the Imperial Copper Company.

The flue dust and slag is the refuse or residue which now remains at the works and on the ground of the Smelting Company; the ores having all been heretofore smelted, the copper bullion arising therefrom having been heretofore sold, and the Copper Company having been heretofore fully paid by the Smelting Company, the full value of all the ores so shipped and smelted.

John H. Martin, Trustee in Bankruptcy of said Imperial Copper Company, Bankrupt, claims this refuse or residue, this flue dust and slag, to be the property of the Imperial Copper Company, and brings this suit to recover the same.

M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, Bankrupt, claims the same to be the property of the Smelting Company, because the Smelting Company purchased and paid for the ores

out of the smelting of which this residuum or by-product arose.

So the clear-cut question is presented: Who is the owner of the flue dust and slag? The Imperial Copper Company, who shipped the ore to the Smelting Company to be smelted, and who has already been paid the full value of the ores it so shipped; or the Smelting Company, who smelted the ores and paid the Copper Company therefor. The lower court held they belonged to the Imperial Copper Company. M. P. Freeman, Trustee, has appealed from that decree.

The suit was first brought by Martin, Trustee of Imperial Copper Company, by petition filed with the Referee in Bankruptcy, in the matter of Southern Arizona Smelting Company, a corporation, bankrupt, wherein he sought to have the Referee order said property delivered to him.

Voluminous evidence was taken before the Referee, from which the Referee found that the contract and transaction under which the Copper Company shipped the ores to the Smelting Company constituted a sale, and not a bailment; that the title to the ores passed to the Smelting Company; that the Smelting Company was the owner of the bullion, flue dust and slag into which the ores were converted; and that neither Martin, Trustee, nor the Imperial Copper Company, was the owner or entitled thereto.

Upon the hearing before the District Court, it was stipulated by the parties that the suit should be deemed

a plenary suit in equity, to be submitted upon the petition and answer theretofore filed with the Referee, and the evidence taken before him. (Record, p. 37). The parties further agreed in open court to the Findings of Fact in the case, and the court made, found and filed its Findings of Fact, in accordance with the facts so agreed to by the parties. (Record, p. 42).

Upon these "Findings of Fact," so made by the court and agreed to by the parties, the lower court found, as a conclusion of law, that the contract under which the ores were shipped by the Imperial Copper Company and smelted by the Smelting Company, constituted **a bailment** and not **a sale;** that the title to all the ores so shipped, "as well as the title to all of the flue dust and slag dump arising from the smelting of said ores by the Southern Arizona Smelting Company, remained in the Imperial Copper Company;" and that the trustee in bankruptcy of the Imperial Copper Company was therefore entitled to the same as part of the estate of said Copper Company, (Record, p. 92), and that the trustee of the Smelting Company was not entitled thereto.

And the court then rendered its judgment or decree, adjudging John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, to be the owner and entitled to possession of said flue dust and slag dump. From this judgment and decree M. P. Freeman, as Trustee in Bankruptcy of Southern Arizona Smelting Company, has appealed to this court.

STATEMENT OF THE FACTS.

The facts in the case, as agreed to by the parties, are set forth in the "Findings of Fact" made and filed by the court. These undisputed facts are concisely as follows:

In May, 1903, the Imperial Copper Company, a corporation, hereinafter called the "Copper Company," was organized under the laws of Arizona, for the purpose of owning and operating mines, etc. (Findings of Fact 1, record p. 43).

In May, 1904, the Copper Company authorized the issuance and sale of $2,000,000 of first mortgage bonds, and secured the same by a trust deed executed by it to the Bankers Trust Company, as Trustee, upon all of the real and personal property it then owned, or might thereafter acquire; which trust deed was duly recorded June 24, 1904. (Finding 2, rec. p. 44).

Amongst the property so mortgaged and covered by said trust deed was a certain 640-acre tract of land, hereinafter referred to.

Thereafter, and on August 6, 1906, the Southern Arizona Smelting Company, a corporation, hereinafter called the "Smelting Company," was organized under the laws of Arizona, for the purpose of acquiring, selling and smelting of ores and metals, and the erection of plants, machinery, etc., in carrying on said business, and for other purposes. (Finding 3, rec. p. 44).

Thereafter, and on August 14, 1906, the Copper Company and the Smelting Company entered into an agreement in writing, wherein the Copper Company agreed, amongst other things, to erect upon the 640-acre tract of land, heretofore mentioned, a smelting plant, having a capacity of three hundred tons daily, and to sell and convey to the Smelting Company said 640-acre tract, with the smelter plant thereon, in consideration of the issuance by the Smelting Company to it of 7,995 shares of its, (said Smelting Company's) capital stock, of the par value of $100 each, a total par value of $799,500; and the Copper Company therein further agreed

> "to furnish the Smelting Company with all ores of every kind produced from the mines of the Copper Company (whether such mines are now owned or hereafter acquired by the Copper Company) that may be desired by the Smelting Company, to be smelted and reduced by the Smelting Company. The term of such contract to be a period of six months from and after the date of the beginning of operations of said smelter. The smelting, reduction and marketing of such ores so delivered by the Copper Company, to be done by the Smelting Company, at the actual cost thereof, plus 5% interest on the cost of the property and plant to the Smelting Company."

Finding 5, rec. p. 47.

Thereafter, and on April 13, 1908, the Copper Company and the Smelting Company entered into another agreement in writing, wherein the Copper Company agreed to erect another blast furnace with buildings,

ore-bins, etc., so as to double the capacity of the smelting plant, in consideration of the issuance to it, by the Smelting Company, of an additional 1000 shares of its capital stock. (Finding 8, rec. p. 63).

In pursuance of these contracts, the Copper Company did, in 1907, erect a smelting plant on the 640 acres, and did convey the said 640 acres, with the smelting plant thereon, to the Smelting Company, and did receive in payment therefor, 7,995 shares of the capital stock of the Smelting Company, par value of $100 each, a total par value of $799,500. (Finding 6, rec. p. 51). And the Copper Company did thereafter cause the additional plant and machinery to be installed, and did receive therefor an additional 1000 shares of the capital stock of the Smelting Company, of the par value of $899,500, which were so issued by the Smelting Company to the Copper Company, in payment for the 640-acre tract of land with the smelting plant and machinery thereon. (Finding 8, rec. p. 65).

As the 640-acre tract of land, upon which the Copper Company was to erect the smelting plant, had been mortgaged to the Bankers Trust Company, under the trust deed executed to secure the $2,000,000 of bonds heretofore mentioned, and as the Imperial Copper Company desired to have the lien of this mortgage or trust deed released as to said 640 acres, so that it could be transferred to the Smelting Company free of any lien, the Copper Company and the Bankers Trust Company, Trustee, with the consent of the holders of all the bonds,

agreed that the Bankers Trust Company should release the lien of its trust deed or mortgage as to said 640 acres, in consideration of the Copper Company substituting as security therefor, the said shares of stock of the Smelting Company, which the Copper Company was to or did receive under the agreements before mentioned. In pursuance of this last agreement, and on the 21st day of December, 1908, the Imperial Copper Company did assign and pledge to the Bankers Trust Company all of the said stock of the Smelting Company, and also certain other shares of stock, not necessary to be considered in this case, as additional security for the payment of the bonds before mentioned, and the Bankers Trust Company did release its lien as to said 640 acres. (Finding 28-29-30, rec. p. 81-85).

On July 3, 1911, the Bankers Trust Company brought suit before the District Court of the First Judicial District of the Territory of Arizona, against the Imperial Copper Company, wherein it sought to foreclose the said mortgage or trust deed, and its lien upon the shares of stock so pledged with it, default having been made in the payment of the interest on the $2,000,000 of bonds to secure which the deed of trust and pledge of stock had been made. (Finding 31, rec. p. 85).

A few days thereafter, to-wit, on July 5, 1911, certain creditors of the Copper Company filed with the said District Court their petition to have the Copper Company declared a bankrupt, and thereafter, and on the 25th day of July, 1911, the Copper Company was ad-

judicated a bankrupt, and M. P. Freeman was elected its trustee in bankruptcy. (Finding 17, rec. p. 74).

On June 17, 1914, Freeman resigned as Trustee in Bankruptcy of the Copper Company and John H. Martin, the appellee in the present case, was appointed trustee in bankruptcy to fill the vacancy. (Finding 19, rec. p. 75).

On July 9, 1914, said Martin, as Trustee in Bankruptcy of the Copper Company, did file in the said foreclosure suit, (the suit having been transferred to the Superior Court of the State of Arizona, the successor of the Territorial District Court) his petition to intervene and make defense to the action, which petition was granted by the State Court; and Martin, as Trustee, did file his answer to the complaint of the Bankers Trust Company against the Copper Company, wherein, amongst other things, he did deny the validity of the lien or pledge upon shares of the capital stock of the Smelting Company, and did deny the validity of the assignment and transfer of said shares to the Bankers Trust Company, as security, as aforesaid. (Finding 32, rec. p. 85).

Thereafter, this foreclosure suit was heard and tried in the State Court, and on December 28, 1914, the State Court did render its decree wherein, amongst other things, it did adjudge that the said shares of the capital stock of the Smelting Company were duly pledged by the Copper Company, as additional security for said bonds, and did foreclose the lien thereon, and did

direct said stock to be sold by its Special Master, and the proceeds of sale to be applied to the payment of said bonds. (Finding 33, rec. p. 86). And in that case the State Court did make certain Findings of Fact to the foregoing effect, which findings the United States District Court, in its Findings of Facts in the present case, held to be binding and conclusive upon Martin, as Trustee, in the present action. (Finding 35, rec. p. 87).

Thereafter, and in pursuance of the decree of the State Court foreclosing the pledge or lien upon the said shares of stock, the same were, to-wit, on the 19th day of April, 1915, sold by the Special Master of the State Court to one Leo Goldschmidt, which sale was duly confirmed by the State Court. So that when Martin, Trustee, brought the present suit, neither the Copper Company, nor the Bankers Trust Company, nor John H. Martin, as Trustee in Bankruptcy of the Copper Company, did have, or now have, any right, title or interest of any kind whatsoever, in and to the shares of the capital stock of said Smelting Company, so pledged and foreclosed as aforesaid. (Finding 36, rec. p. 90).

We may briefly summarize then, the transaction in regard to the shares of stock of the Smelting Company as follows: The Smelting Company issued to the Copper Company about 9,000 shares of its capital stock, of the par value of about $900,000, in payment for the 640 acres of land with the smelting plant thereon. The Copper Company pledged these 9,000 shares of stock with the Bankers Trust Company, as additional security

for its $2,000,000 of bonds, and also in consideration of the Bankers Trust Company, as Trustee, releasing the lien it had on the 640-acre tract of land. The shares were so pledged with the Bankers Trust Company, Trustee, in December, 1908; default was made in the payment of interest on the bonds, and the pledge or lien on the stock was foreclosed by a suit in the State Court, in which suit Martin, Trustee in Bankruptcy of the Imperial Copper Company, was a party. Under the decree of foreclosure in that suit the said shares were sold to a third person, to-wit, Leo Goldschmidt, which sale was confirmed by the State Court, and neither the Imperial Copper Company, nor Martin, as its Trustee in Bankruptcy, has any interest of any nature whatsoever, in any of the shares of stock of the Smelting Company; on the contrary, they are the property of the third person, to-wit, of Leo Goldschmidt. And thus ended all title or interest of the Copper Company, or its Trustee in Bankruptcy, in and to said shares of stock.

THE CONTRACT OF SMELTING ORES.

As heretofore stated, in the contract of August 14, 1906, between the Copper Company and the Smelting Company, the Copper Company agreed to furnish the Smelting Company with all ores of every kind produced from its mines, that might be desired by the Smelting Company, the term of such contract to be a period of six months from and after the date of the beginning of the operations of the smelter. And the Smelting Company agreed to smelt, reduce, and market such ores, so delivered, at the actual cost, plus 5% interest on the cost of the property and plant of the Smelting Company, that is, 5% on $900,000, or $45,000 per annum. (Finding 5, rec. p. 47).

The smelting plant was completed and commenced operations about January 1, 1908, and continued operations until August 15, 1910, when the same was closed down; and it has not operated since. (Finding 9, rec. p. 66).

Before commencing operations, and before any ores were shipped by the Copper Company to the Smelting Company, to-wit, on December 16, 1907, the Smelting Company, as party of the first part, entered into an agreement with the American Metals Company, Ltd., as party of the second part, and the Copper Company, as party of the third part, which agreement is in writing, and is set forth in Finding 7, rec. p. 51.

In this agreement it was, amongst other things, agreed by all three of the parties, as follows:

"I. The party of the first part (Smelting Company) agrees to sell, and hereby does sell at the price and upon the terms hereinafter set forth, to the party of the second part (American Metals Company, Ltd.) the entire output of copper now or at any time during the existence of this agreement smelted, owned, or controlled by it, which it guarantees shall not be less than 1,250,000 lbs. to 1,500,000 lbs. monthly, subject to conditions hereinafter set forth, for a period of three years beginning with the first shipment expected to be made in January, 1908, and terminating three years thereafter.....

II. The copper shall be delivered by the party of the first part (Smelting Company) to the party of the second part (American Metals Company, Ltd.) at New York, lighterage free, or at the option of the producers at Nichols Siding, Long Island Railroad, provided no additional expense be occasioned the party of the second part.

Said deliveries to be made in the form of blister copper in plates, measuring.....And assaying about 98½% or over in copper.....

III. The party of the second part agrees at the request of the party of the first part, to advance and pay the freight charges upon the said deliveries of copper when the same shall become due in New York, and upon receipt of consignment to use due diligence in causing the same to be weighed, sampled and assayed, as hereinafter provided; and to account to the party of the first part (Smelting Company) at is office in New York, on the due dates as hereinafter defined, for the copper, gold and silver contents of said consignments, less all

advances, if any, with interest thereon; also less refining charges as hereinafter specified;..... The party of the first part shall give the party of the second part prompt written notice of each shipment.

The party of the first part shall have the privilege of drawing at sight upon the party of the second part for 90% of the approximate value of such blister copper, less freight and interest and refining charges, as above set forth, as shown by the bill of lading, satisfactory assay certificates.....

Whenever an advance has been made by the party of the second part upon any consignment of copper by means of a draft drawn by the party of the first part, as above provided, and any of such copper be lost, or for any cause whatever not delivered to the party of the second part, within a reasonable time, in no event to exceed sixty days after such advance, the party of the first part shall promptly repay the party of the second part the amount of such draft, with interest.

IV. It is mutually agreed that each delivery of blister copper shall be weighed and sampled upon arrival at the refining works by the party of the first and second parts hereto, and by methods mutually agreed upon by them, each such party paying its own representative.

V. The party of the second part (American Metals Company, Ltd.) agrees to purchase and hereby does purchase the said material from the party of the first part (Smelting Company) upon the terms herein set forth, and agrees to pay the party of the first part (Smelting Company) for the same in the following manner:

For all gold at the rate of $20 per ounce.....

For the silver contents of said material.....

For the copper contained in said material on the basis of electrolytic assay, at the average price of electrolytic copper in cakes, wire bars or ingots, as quoted daily in the Engineering and Mining Journal of New York for the week during which the material is sampled at the refiners.....

The party of the second part (American Metals Company, Ltd.) shall deduct and be entitled to retain from the moneys that may be payable to the party of the first part (Smelting Company) pursuant to the terms of this contract for the cost of refining such material $15 for 2000 lbs. of copper find.

VI. And the party of the third part (Imperial Copper Co.) hereto, representing that it owns practically all of the stock of the said party of the first part hereto, and owns or controls some of the mines from which the party of the first part is to acquire ore covered by this agreement, and as a further inducement for the party of the second part to enter into this agreement, the party of the third part hereto guarantees to the party of the second part the prompt and faithful performance by the said party of the first part hereto of all the terms and provisions of this agreement on the part of the party of the first part to be done or performed, and the party of the third part hereby waives notice of each and every default under this agreement on the part of the party of the first part."

Finding 7, rec. p. 51.

The gist of the foregoing contract is that the Smelting Company shall sell to the American Metals Company, all bullion produced by it, and the American Metals Company shall buy all of the bullion so produced, and pay the Smelting Company therefor. And this agree-

ment, that the Smelting Company shall sell the bullion and shall receive the money paid therefor, is ratified and agreed to by the Copper Company.

METHOD OF CONDUCTING BUSINESS UNDER THE CONTRACTS.

From the time the Smelting Company commenced operating the smelter in 1908, down to the time it ceased operating, in 1910, the Copper Company shipped to it over 500,000 tons of ore, and the same was smelted and reduced to bullion by the Smelting Company, under the terms of the contract heretofore mentioned, and the bullion so produced was sold by the Smelting Company to the American Metals Company, in accordance with the contract heretofore referred to. (Finding 10, rec. p. 66).

The manner in which the business between the Companies was conducted was as follows:

The Copper Company made shipments of ore to the Smelting Company in carload lots. Each carload was designated by a lot number; assay was made thereof by the Smelting Company and a smelter return upon each lot so sampled and assayed was made and delivered by the Smelting Company to the Copper Company. Each smelter return was in the following form:

SOUTHERN ARIZONA SMELTING COMPANY

Sasco, Arizona, (Date.)

Bought of Imperial Copper Co.,
Silverbell, Arizona.

NEW YORK QUOTATIONS:
Avg. E. & M. Journal
Date 7-28 to 8-13 incl.
Copper 12-417 cts. per lb.

Class UNION ORE
Smelter Lot No. See Under
Shipper's Lot No, "Car No."
DATE SAMPLED Aug. 1-13th incl.

CAR Init. Sm.	Nos. Mine	Wet 3,094,880	Moist 5.1	Weight Dry 2,936,928
3926	3697			
3930	3701			
3934	3705			
3938	3709			
3943	3713			
3947	3717			
3965	3736			
3969	3739			

Payments:	VALUES Per Ton	Total
Silver N. P.		
Copper 2.32% 46.4 lbs. @ 9.917	4.60	4.60
Deductions:		
Treatment	2.20	2.20
Price per ton	2.40	

Gross proceeds 1,468,464 tons @ 2.40 ..... 3524.31
Less freight from Silver Bell; Prepaid
Balance Due 3524.31

Correct: D. G. H. Invoice Clerk
Checked: D. G. H.
Approved: Meade Goodloe, Superintendent

The net value or balance due, according to each smelter return, was credited by the Smelting Company on its books, as so much money due to the Copper Company. Likewise the Copper Company also entered on its books this net value or balance due, as the amount due to it from the Smelting Company, for the particular lot of ore so shipped and accounted for. (Finding 11, rec. p. 67).

The bullion which resulted from the smelting of the ores so shipped, as well as the bullion arising from smelting of ores for the public generally, were by the Smelting Company shipped and sold to the American Metals Company, under the contract heretofore mentioned. The American Metals Company, on its part, rendered an account sales to the Smelting Company, for each lot of bullion so shipped, which showed that it had received and sold for account of the Smelting Company the amount of the bullion as per the lot number, the assay value, charge for refining, etc., leaving a net balance due to the Smelting Company, as per form set forth in Finding of Fact, 11, rec. p. 70.

As the Smelting Company made each shipment of bullion to the American Metals Company it obtained a bill of lading therefor from the Railroad Company, which bill of lading the Smelting Company delivered to the Imperial Copper Company; and the Imperial Copper Company collected the amount from the American Metals Company and credited the same to the account of the Smelting Company; and the Smelting Company on its part, charged the Copper Company with the amount of money which the Copper Company so received. (Finding 12, rec. p. 71).

In other words, the Smelting Company bought the ores from the Copper Company on the basis of the assay value of the ore, less smelter charge, and became the debtor of the Copper Company for the balance so ascertained. All the bullion which the Smelting Company

produced from the ores shipped to it by the Copper Company, as well as from the ores shipped to it by others, it sold to the American Metals Company, and it directed the American Metals Company to pay the amount thereof to the Copper Company, which was done, and the Copper Company credited the Smelting Company as having received from it that much money. (Findings 12, 13, 14, and 15, rec. p. 71, 72 and 73).

The method by which the Smelting Company paid its bills, including labor, material, coke, fuel and all other charges which it had to pay in the conduct of its business, was by drawing an order for the amount on the Imperial Copper Company, in favor of the person to be paid, with request that the Copper Company pay the same, and charge the amount to the account of the Smelting Company. The Copper Company paid the order and charged the same as so much money paid to the Smelting Company, as any bank would have done upon a check. Entry of the transaction was made in the books of each of the Companies. The Copper Company did not pay any moneys for the Smelting Company which it did not charge against the Smelting Company; the accounts between the two Companies were balanced monthly. (Finding 13, rec. p. 72).

In addition to smelting the ores for the Copper Company, the Smelting Company smelted ores for other persons and corporations, and it also shipped and sold the bullion produced from these other ores, in the manner above stated. The Smelting Company paid for the

ores which it so purchased, by orders on the Copper Company, which orders the Copper Company paid, and the amount of which payments the Copper Company charged against the account of the Smelting Company. (Finding 14, rec. p. 72).

In conducting its smelting operations the Smelting Company produced large amounts of flux and coke. Its purchase of coke alone from January, 1908, to September, 1910, being of the value of over $500,000. The manner in which the Smelting Company paid for this coke was by an order drawn on the Imperial Copper Company, which the Imperial Copper Company paid, and the amount of which payment the Copper Company charged against the Smelting Company. And the Smelting Company also kept account thereof itself. (Finding 15, rec. p. 73).

In other words, all of the moneys received by the Smelting Company from the sale of bullion produced by it, it turned over or deposited with the Copper Company, for which deposit it received a general credit. Out of these moneys the Copper Company paid, upon the order of the Smelting Company, the amounts due to the Copper Company for the ores shipped by it to the Smelting Company, as ascertained and settled by each smelter return; and also paid all orders for labor, material, coke, etc., which the Smelting Company drew upon it, and requested it to pay, and charged such payments against the account of the Smelting Company. Each month a balance was struck between the two com-

panies, showing how the account between them stood.

In August, 1910, the Smelting Company closed down its plant and ceased to operate the same; but it continued to present orders for labor, material and other items of like nature, to the Copper Company, requesting it to pay the same, and the Copper Company did pay the same, up to July, 1911, when the Copper Company went into bankruptcy. On that date the books of the Copper Company showed that the Copper Company had paid out a total of $26,887.71, in excess of all the moneys which it had received and credited to the account of the Smelting Company, so that on that day, according to its books, a balance was due the Copper Company from the Smelting Company of $26,887.71. (Finding 16, rec. p. 73).

In other words, after the Copper Company had been fully paid the value of all of the ores which it shipped to the Smelting Company, and had been repaid all of the amounts it had advanced or paid on the orders of the Smelting Company, there remained a balance due it of $26,887.71. And this amount the Copper Company treated as a debt due from the Smelting Company to it.

After the Copper Company had been adjudicated a bankrupt, its trustee in bankruptcy, considering this balance as a debt due from the Smelting Company to the Copper Company, brought suit in the State Court against the Smelting Company for the recovery of this amount. (Finding 17, rec. p. 74).

And thereafter the said trustee in bankruptcy of the

Imperial Copper Company did, upon application of certain creditors of the Copper Company, Bankrupt, cause a writ of attachment to issue in the said suit, and did cause the same to be levied upon all the real property of the Smelting Company; which suit is still pending. (Finding 18, rec. p. 75).

The Copper Company, therefore, has been fully paid for the ores which it shipped to the Smelting Company, and has been fully repaid for all moneys which it paid out for the Smelting Company except the balance of $26,887.71, and for this balance Martin, as trustee in bankruptcy of the Copper Company, has brought suit in the State Court, which suit is still pending.

On September 29, 1914, being more than three years after the Copper Company had been adjudicated a bankrupt, the Smelting Company itself filed with the U. S. District Court for Arizona, its voluntary petition in bankruptcy, and on said 29th day of September, 1914, the Smelting Company was adjudicated a bankrupt; and thereafter, and on October 31, 1914, M. P. Freeman was appointed and qualified as its Trustee in Bankruptcy. (Finding 25, rec. p. 79).

Thereafter and on August 25, 1915, John H. Martin, as Trustee in Bankruptcy of the Copper Company, did file with the Referee of said District Court, in the matter of the bankruptcy of said Smelting Company, the said claim of the Imperial Copper Company, for the before mentioned balance of account of $26,887.71, for which

his suit was pending, as aforesaid, claiming that this amount was due from the Smelting Company to the Copper Company. (Finding 26, rec. p. 80).

So that not only did the Imperial Copper Company itself consider this balance as a debt due from the Smelting Company to it; but John H. Martin, its Trustee in Bankruptcy, the appellee herein, has also considered this balance as a debt due from the Smelting Company to the Copper Company; being the balance unpaid for all ores shipped and all moneys advanced by the Copper Company to or for the Smelting Company.

HOW THE FLUE DUST AND SLAG DUMP WAS CREATED.

The flue dust and slag dump, which is the subject matter of the present suit, arose in the following manner: The ores received by the Smelting Company were placed in its smelter, together with coke and flux; the coke was ignited, a blast of air was turned on to the mass; the fine particles of ore and coke were blown into a stack which ended in a chamber in which the dust was collected continuously during smelting operations. This dust constitutes the flue dust in controversy, and the amount thereof is about 10,000 tons. (Finding 20, rec. p. 76).

The ores, in the process of smelting, were converted into bullion containing copper, into the flue dust just mentioned, and into a residue which is called slag. The

bullion produced has all heretofore been shipped and sold by the Smelting Company, as heretofore stated. There now remains only the flue dust and the slag. The slag constitutes the slag dump in controversy in this case, aggregating many thousand tons, which is of very little, if any, value. (Finding 20, rec. p. 76).

The Copper Company, as before stated, was adjudicated a bankrupt, in July, 1911. M. P. Freeman was its first trustee in bankruptcy. He resigned in July, 1914, and John H. Martin was appointed to fill the vacancy. While M. P. Freeman was still Trustee in Bankruptcy of the Copper Company, certain creditors of said bankrupt Copper Company requested him, as Trustee, to take possession of the property and assets of the Smelting Company, on the theory that those assets belonged to the Copper Company; which request he as trustee, on the advice of his attorney, refused, for the reason that said property was not the property of the Copper Company. (Finding 22, rec. p. 77).

Upon the Smelting Company shutting down its plant in August, 1910, George W. Dietz, acting manager of the Smelting Company, took possession of all of its property, including the flue dust and slag dump, and remained in continuous possession of all of the property of the Smelting Company, including the flue dust and slag, continuously for a period of more than four years, to-wit, until he delivered the same to the trustee in bankruptcy of said Smelting Company, in October, 1914; and during all of said times the Smelting Com-

pany has had possession and claimed ownership of said flue dust and slag. (Finding 21, rec. p. 77).

It was not until John H. Martin was appointed trustee in bankruptcy of the Copper Company, to-wit, on or about July 5, 1914, that any effort was made by the Copper Company, or its trustee in bankruptcy, to take possession of said flue dust and slag. But in July, 1914, John H. Martin, as such Trustee, did attempt to take possession thereof, by posting notice to that effect, and by leaving a keeper on the ground, although the Smelting Company, at the time, had its own keeper on the ground. (Finding 23, rec. p. 79).

The following creditors of the Smelting Company have filed their claims with the Referee in Bankrutcy, in the matter of Southern Arizona Smelting Company, Bankrupt, which claims have been duly allowed by the Referee, to-wit:

Name of Creditor.	**Amount of Claim.**	
Consolidated National Bank..	$20,000.00	and interest
Aubrey & Semple	1,894.12	and interest
Colorado Fuel & Iron Co.....	27,759.71	and interest
F. M. Murphy.....	4,897.59	
B. P. Cheney.....	3,073.81	
Poland Mining Company....	311.05	
F. M. Murphy and B. P. Cheney	1,500.00	and interest
Louis St. Louis.....	400.00	
George W. Dietz	400.00	
	$60,236.28	

Finding 27, rec. p. 80.

So that in September, 1914, when the Smelting Company was adjudicated a bankrupt, it owed debts of the aggregate amount of over $60,000, plus interest, in addition to the debt claimed as due from it to the Copper Company, and its various creditors have filed their claims in the bankruptcy proceedings of the Smelting Company, which claims have been duly allowed.

CONCLUSION OF LAW.

From the foregoing facts, the lower court made its conclusion of law to the effect that Martin, as Trustee of the Imperial Copper Company, was the owner and entitled to the possession of the flue dust and slag, and from that judgment or decree Freeman, Trustee, has appealed to this court. (Rec. pp. 91-93).

So the only question presented upon the appeal of this case is whether or not, under the undisputed facts as found by the court, the decree of the lower court, in adjudging John H. Martin, Trustee of the Copper Company, to be the owner and entitled to the possession of said flue dust, and slag, is right or wrong.

SPECIFICATION OF ERRORS RELIED UPON.

The decree of the court is erroneous in this:

1. That therein John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, is adjudged to be the owner and entitled to possession of the flue dust and slag dump in controversy in this action, whereas, the court should have adjudged and decreed that M. P. Freeman, as Trustee in Bankruptcy of the Southern Arizona Smelting Company, was the owner and entitled to the possession thereof.

2. That under the Findings of Fact, as made by the court, it clearly appears that the contracts under which the Imperial Copper Company shipped its ores to the Smelting Company to be smelted, did not contemplate a return of these ores to the shipper, either in their original form, or in their altered form, as bullion, flue dust and slag; but did contemplate a payment by the Smelting Company for the value of the ores; that it further appears from said Findings, that all of the ores were smelted and converted into bullion, and that the Imperial Copper Company has already received the full value of the ores it so shipped, except a small balance, which it claims as a debt; and therefore, it is not entitled to a return either of the ores in their original form, or in their altered form as bullion, flue dust or slag. And the conclusion of law made by the lower court, to the effect that the contract under which the ores were shipped

was a contract of bailment and not of sale is erroneous, and the decree predicated on such erroneous conclusion of law is likewise erroneous.

3. That from said facts the court should have found as a conclusion of law, that the contract between the parties was one of sale, wherein the title to the ores passed upon delivery to the Smelting Company, and the court should have decreed that M. P. Freeman, as trustee in bankruptcy of the Smelting Company, was the owner of said flue dust and slag.

POINTS OF LAW TO BE DISCUSSED.

1. The contract under which the ores were shipped by the Copper Company to the Smelting Company constituted a contract of sale, wherein the title to the ores shipped passed to the Smelting Company upon delivery, and did not constitute a bailment, in which the title to the ores, in either their original or altered form, remained in the Copper Company.

2. As the Copper Company had pledged as security for its bonded indebtedness, all of the shares of the capital stock of the Smelting Company owned by it, and as that pledge has been foreclosed and the shares under such foreclosure had been sold to a third person, to-wit, Leo Goldschmidt, who is now the owner thereof; neither the Copper Company, nor its Trustee in Bankruptcy, is the owner of those shares of stock, nor of the assets of said Smelting Company which these shares rep-

resent; but said assets belong to the stockholders of said Smelting Company, to-wit, Leo Goldschmidt, and his assigns, subject only to the payment of the debts due by the Smelting Company.

3. As the Smelting Company was in possession of the flue dust and slag, claiming the same adversely to the Copper Company and its Trustee in Bankruptcy, for more than three years before the present suit was brought, the right of action of the trustee in bankruptcy of the Copper Company to recover said property, is barred by the Statute of Limitations of Arizona, to-wit, by the provisions of Sections 710, 711, 713, and 716, of the Revised Statutes of the State of Arizona of the year 1913.

ARGUMENT.

Point One.

The Contract Under Which the Copper Company Shipped Its Ores to the Smelting Company, Constituted a Sale, and Not a Bailment.

As the findings of Fact made by the lower court in this case are admitted to be correct by both parties to the action, there is only one question presented upon this appeal; a question of law, namely: Whether or not, under the admitted facts as found by the court, the title to the ores shipped by the Copper Company and smelted by the Smelting Company, remained in the Copper Company; or whether the title thereto passed to the Smelting Company.

In other words, whether or not the contract between the two Companies was a contract of bailment, or was a contract of sale. If a contract of bailment, then the decree of the lower court is right; for in a bailment the title to the property delivered always remains in the bailor, both in its original and in its altered form. If it was a sale, then the decree of the lower court is wrong; for in a sale the title passes, and the shipper has only a debt for the value of the property delivered.

M. P. Freeman, appellant, claims that the contract between the two companies under which the ores were shipped and smelted, constituted a contract of sale; that the title to the ores passed to the Smelting Company upon delivery, and that the Smelting Company became the debtor of the Company for the value of the ores so delivered.

He further claims that the Smelting Company has already paid to the Copper Company the full value of these ores, and if it owes anything to the Copper Company, it is only for a comparatively small balance on the general account between the two Companies.

The lower court held the contract between the two Companies to constitute a bailment, and not a sale.

We will show that the lower court was wrong; that the contract constituted a sale, and not a bailment; and therefore, the judgment and decree of the lower court should be reversed.

WHAT IS A BAILMENT?

"A bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be."

6 Corpus Juris, p. 1084.

"Bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor or otherwise dealt with, according to his directions, or kept until he reclaims them."

Am. & Eng. Ency. of Law, Vol. 3, p. 733.

"It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed, either in the same or in its altered form."

6 Corpus Juris, p. 1086.

"If the identical thing, either in its original or in its altered form, is to be returned, it is a bailment."

Union Stock Yards Co. vs. Western L. & C. Co., 7 C. C. A. 660; 140 Fed. 49;
Powder Co. vs. Burkhart, 97 U. S. 116;
Sturm vs. Boker, 150 U. S. 312.

DISTINCTION BETWEEN BAILMENT AND SALE.

"The fundamental distinction between the two (bailment and sale) is that in a bailment the identical thing delivered, in the same or an altered form, is to be restored, **and the title to the property is not changed;** while in a sale there is no obligation to return the specific article, but the party receiving it is at liberty to return another thing of equal value, either in the form of money or otherwise, and becomes a debtor to make the return **and the title to the property is changed."**

Am. & Eng. Ency. of Law, Vol. 3, p. 735.

"The fundamental distinction between a sale and a bailment lies whether an obligation exists to restore the thing delivered in the same, or in an altered form, and in whether the title passes.

The transaction is a bailment if the identical thing is to be returned although in altered form.

If the receiver is not bound to return the identical things, but is at liberty to return something else, as a rule the property passes, and the transaction is in effect a sale or exchange."

Corpus Juris, Vol. 6, p. 1086, 1087.

35 Cyc. 28-29.

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements, peculiar to each. In bailment the identical thing is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return."

In re Galt, 56 C. C. A. 470; 120 Fed. 64-69.

In the case of Laflin & Rand Powder Company v. Burkhardt, 97 U. S. 110, 24 L. ed. 973, the court held, we quote from the syllabus:

> "Where articles are delivered to be manufactured, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is a bailment, **and the title does not vest in the manufacturer.**
>
> BUT, if the manufacturer is not bound to return the same articles delivered, but may deliver any other of equal value, it is a sale or a loan **and the title to the thing delivered vests in the manufacturer."**

CASES ILLUSTRATIVE OF THE DIFFERENCE BETWEEN BAILMENT AND SALE.

In the case of Laflin and Rand Powder Co. vs. Burkhardt, 97 U. S. 110-120, 24 L. ed. 973-977, supra, Ditmar and the Powder Company entered into a contract, under which the Company delivered to Ditmar certain materials which he was to manufacture into an expensive explosive compound, and when manufactured, were to be by him sent to the Company to be by it sold for their joint account. After the material had been delivered to Ditmar, one Burkhardt sued Ditmar for a debt, recovered judgment, caused execution to issue, and under the execution levied upon and sold the material so delivered to Ditmar, claiming the same to be

the property of Ditmar. The Powder Company claimed title to the property and brought suit to recover the same on the theory that the contract under which it delivered the material to Ditmar created a bailment and not a sale. The court held that the delivery of the material to Ditmar did not create a bailment; but did create a sale, and that the title vested in Ditmar upon delivery and was subject to his debt. In rendering its decision in that case, the court said:

> "Thus where logs are delivered at a sawmill to be manufactured into boards, or leather to a shoemaker to be made into shoes, rags into paper, olives into olive oil, grapes into wine, wheat into flour, if the product of the identical articles delivered are to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law. See Pierce vs. Schenck, 3 Hill, 28; Norton vs. Woodruff, 2 N. Y. 152; Mallory vs. Willis, 4 N. Y., 76; Foster vs. Pettibone, 7 N. Y. 433."
>
> Laflin and Rand Powder Co. vs. Burkhardt, 97 U. S. 110; 24 L. ed. 973-977.

In the case of Austin vs. Seligman, 18 Fed. Rep. 519-523, the plaintiff alleged in his complaint that he delivered to Kempt & Co. certain jeweler's sweepings of the value of $4,292, to be refined by them, and that he agreed to pay that firm for the refining thereof the sum of

$320; that by the terms of the agreement between them the product of the refining was either to be delivered to them, or the value thereof accounted for, less the agreed price for refining. The question was whether or not this contract was one of bailment or of sale. The court held it was a sale. In its decision the court said:

> "But the rule is well settled that when, by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the transaction is not a bailment, but is a sale or exchange. Here the agreement was that Kempt & Co. should return the refined product of the sweepings or account for the value thereof, less the price for refining. They had an option which was inconsistent with the character of a bailment. Hurd vs. West, 7 Cow. 752; Smith Merry, 3 Mason, 478; Chase vs. Washburn, 1 Ohio St. 244; Ewing vs. French, 1 Blackf. 353; Schouler, Bailm, 5. The case is not one where they had possession of the plaintiff's property under an executory agreement to purchase, but one where the title passed on delivery, unless the delivery was a bailment. It was not a bailment if they had a right to return money in its place."

Austin vs. Seligman, 18 Fed. Rep. 519-523.

In the case of Smith vs. Clark, 21 Wend. 84, 34 Am. Dec. 213, it was held:

> "Where a miller agreed with other persons to deliver to them for every four hundred and fifty five pounds of wheat received, one barrel of super-

fine flour, and there was no stipulation or understanding that the wheat should be returned in the form of flour, the transaction constituted a sale, and not a bailment, and the title to the wheat passed upon the delivery thereof."

"Farmers delivering milk to a cheese factory were each credited with the amount of their milk which was mixed together and made into cheese which the Company sold. After deducting a commission, the balance of the proceeds of the sales was divided between the farmers according to the amount of milk delivered. Held, that there was no bailment as to the particular milk delivered, but that the transaction was a sale."

Butterfiield vs. Lathrop, 71 Pa. (21 P. F. Smith) 225.

In the case of Scott Mining & Smelting Company vs. Shultz & Clary, 67 Kan. 605; 73 Pac. 903, the court held:

"Mining property, consisting of real estate and personal property, was leased by the owner to another for a term of years at a stipulated royalty, and it was agreed in the lease that at its expiration the personal property, which included some that would be consumed by use, should be returned by the lessee in kind or value, according to an invoice which had been made, at the option of the lessor. **Held,** that the transaction was in the nature of a sale of the personal property, and the title thereto passed to the lessee."

We also refer to the case of Chisholm vs. Eagle Ore Sampling Company, 75 C. C. A. 472, 144 Fed. 670-673, which construed a contract relative to ores ship-

ped to a smelter to be smelted, and wherein the facts are very similar to the facts in the case at bar. The contract was held to constitute a sale and not a bailment. We think this case is decisive of the present case.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

Under the contract between the Copper Company and the Smelting Company, of date August 14, 1906, set forth in full in Finding 5, rec. p. 47-51 the Copper Company agreed to furnish the Smelting Company with all the ores it produced that might be desired by the Smelting Company, "the smelting, reduction and marketing of such ores so delivered by the Copper Company to be done by the Smelting Company, at the actual cost thereof, plus 5% interest on the cost of the property and plant of the Smelting Company."

After the execution of this agreement, and before any ores were shipped or smelted, the two Companies entered into an agreement with American Metals Company, of date December 16, 1907, which agreement is set forth in full in Finding 7, rec. p. 51-63 wherein, amongst other things, it was agreed that all of the bullion produced by the Smelting Company, in the course of its smelting operations, should be by the Smelting Company sold to the American Metals Company, and that the American Metals Company should pay the Smelting Company therefor.

The Copper Company was party to this agreement, and therein it did specifically agree that the bullion, which was the altered form into which all the ores received and smelted by the Smelting Company, and the moneys received therefor should be paid to the Smelting Company. (Finding 7, rec. p. 51-63).

This agreement specifically negatives any idea on the part of the Copper Company or the Smelting Company that the bullion, which was the altered form into which the ores were to be changed, should be returned to the Copper Company. On the contrary, the Copper Company specifically agreed that said bullion should **not** be returned to it, but should be sold by the Smelting Company, and that the proceeds of such sale should be paid **to the Smelting Company.**

The contracts therefore, by which the Copper Company was to ship its ore to the Smelting Company absolutely preclude any idea of bailment; for in no event was the Smelting Company to return or redeliver to the Copper Company the ores, either in their original form as ores, or in their altered form as bullion.

In bailment the title to the property in its original or in its altered form remains in the bailor. But to constitute a bailment, as all the authorities hold, there must be an agreement or an obligation that the identical property delivered be returned, either in its original or in its altered form.

In the present case the ore was delivered for the

specific purpose of changing its form into bullion. A return of the ore itself was not contemplated.

Nor was the ore in its altered form of bullion to be returned or redelivered to the Copper Company; for the Copper Company specifically agreed that the bullion should be sold by the Smelting Company to the American Metals Company and that the American Metals Company should pay the Smelting Company therefor. A return, therefore, of the ore in the altered form of bullion, was not contemplated, or agreed to by the parties.

The Copper Company, in that written agreement, went further and guaranteed that the Smelting Company not only would and should sell to the American Metals Company all the bullion produced from ores delivered by the Copper Company to the Smelting Company, but also would sell to it all the bullion produced from any and all ores smelted by said Smelting Company; which necessarily included ores which the Smelting Company might buy from other parties and treat in its plant.

The ores, then, which the Copper Company was to deliver to the Smelting Company under the contracts, aforesaid, and all the ores which it did, as a matter of fact, deliver under said contracts, were not to be returned to the Copper Company by the Smelting Company, either in their original or their altered form; and the essential elements of a bailment did not exist in the transaction. For, again to quote from Vol. 6, Corpus Juris, p. 1086:

> "It is of the very essence of a contract of bailment that it shall contemplate a return of the property bailed, either in its same or in its altered form."

It is clear, therefore, that the two contracts, above mentioned, under which the Copper Company was to deliver its ores to the Smelting Company did not constitute a contract of bailment; and if the ores were not delivered under a contract of bailment, then the title to the same when delivered did not remain in the Copper Company.

As the contract was not one of bailment, the question arises what was the contract. We will now show that it was a contract of sale, so treated and considered and acted upon by each of the two companies.

THE CONTRACTS AS CONSTRUED BY THE PARTIES.

As each lot of ore was delivered by the Copper Company to the Smelting Company, the Smelting Company executed to the Copper Company an instrument in writing, as each such lot was sampled and assayed; and this instrument was accepted by the Copper Company. This instrument shows what the transaction was.

The instrument referred to is called in the Findings of Fact the "Smelter Return." (Finding 11, rec. p. 68). Each of these instruments, so issued by the Smelting Company upon delivery of each lot of ore, recites:

"Southern Arizona Smelting Company. **Bought** of Imperial Copper Company." (Rec. p. 68).

Then follows in the instrument a description of the property bought, its weight, gross value, charge for treatment, net value, and **the balance** due therefor from the Smelting Company to the Copper Company.

Thus, referring to the "smelter return" set forth in the Findings of Fact (rec. p. 68), it is recited: "Southern Arizona Smelting Company. Bought of Imperial Copper Company". The property is described as "Union ore". The car lot number is given, the weight is given, the assay value in copper, the number of pounds of copper per ton is stated, and the price of the copper per pound is stated, making a gross value of $4.60 per ton. The treatment or smelting charge is given at $2.20 per ton, and this charge deducted from the gross value, leaves the "price per ton" at $2.40, and at this price per ton the total net price of the ore or property is $3,-524.31, as this is stated as the "balance due." This "balance due" was accepted by both the Companies to be the balance due from the Smelting Company to the Copper Company for the ores so shipped and bought by the Smelting Company from the Copper Company, for the particular lot or shipment described in the instrument, or "Smelter Return."

And the court, in its Findings of Fact, further finds: "The net value of each ore shipment so ascertained and shown on each smelter return, was credited to the account of the Imperial Copper Company on the books

of the Smelting Company; and the amount was also credited on the books of the Imperial Copper Company, as representing the value of the ore so shipped by the Copper Company to the Smelting Company." (Finding 11, rec. p. 69).

The identity of the ore, after being sampled, was lost. All the ore shipments were mixed together and the bullion produced was not the bullion of any one particular lot of ore, but the result of all the ores which were mixed together; so that it was impossible ever thereafter to ascertain the amount of bullion into which any particular lot of ore was converted.

The bullion might all have gone up into flue dust and smoke, or the bullion might have run into the slag. It made no difference to the Copper Company. The value of each shipment of ore was determined before such ore was smelted, and that value was agreed upon by both the Companies, as a debt due from the Smelting Company to the Copper Company, to be paid by the Smelting Company, and what became of the ore thereafter was utterly immaterial. The Copper Company simply claimed its debt for the value of the ore as shown by the Smelter Return, and it was that debt which the Smelting Company paid.

Therefore, we say that the transaction between the parties, as shown by the respective instruments in writing executed by the Smelting Company, called "Smelter Returns," was an admission on its part that it had bought each respective lot of ore so delivered to it by

the Copper Company, and that it owed therefor the amounts stated therein as the "balance due." And these "Smelter Returns," which were accepted and acted upon by the Copper Company as being true statements of the transaction, are a binding admission on the part of both Companies that the transaction constituted sales and not bailments. And they are further admission that the balance due as shown in each Smelter Return, was the balance struck and agreed upon by the parties as the balance due upon the particular sale of the particular lot of ore described therein.

If then, each delivery of ore constituted a sale thereof, the title necessarily passed to the purchaser, namely, the Smelting Company, and the Smelting Company became the debtor of the Copper Company for the value, as ascertained and agreed to by both the parties. The Smelting Company became the owner of the ore and at the same time it became the debtor of the Copper Company for its value. The Copper Company parted with the ore, but at the same time it became the creditor of the Smelting Company for the ascertained and determined value thereof.

That this is true is further shown by the fact that the Smelting Company, in purchasing ores from other persons, executed to them similar instruments in writing or smelter returns, of the same form as those executed to the Copper Company. It treated all shippers of ore in the same manner. They were all vendors of ore, and it was a purchaser from each and all of them.

In regard to purchases made from other purchasers of ore the court made the following finding:

> "In addition to smelting the ores for the Imperial Copper Company, the Smelting Company also smelted ores for other persons and corporations, such as the El Tiro Copper Company, the Poland Mining Company, Mackomick Mercantile Company, and others.
>
> A record was kept by the Smelting Company of all ores purchased by it from all such other parties and corporations, down to the time it ceased operations, which showed in detail the weight of the ore, amount of ore shipped, treatment charge and other deductions, and the balance due to the shipper for the lot so shipped. A smelting return was made by the Smelting Company of each lot of ore so shipped to it for each of such other shippers, and payment for the ore was made of the balance, after making the deductions just mentioned; such return being in a form similar to the smelter return heretofore set forth.
>
> The payment for ore so smelted and purchased from other persons by the Smelting Company was made by an order drawn by it upon the Imperial Copper Company, and this order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company." (Finding 14, rec. p. 72-73).

As before stated, the Copper Company charged on its books the value of each shipment of ore which it so made to the Smelting Company, as a debt due to it from the Smelting Company. And, as also heretofore shown, this debt, and all these debts, have been paid by the Smelting Company to the Copper Company, except a

comparatively small balance, heretofore referred to. (Finding 11, rec. p. 69).

In the process of smelting the ore, it was necessary to add fluxes and coke thereto. The Smelting Company itself bought the fluxes, consisting of lime and iron, and itself bought the coke, the total purchases for coke alone amounting to over $500,000. The flux and the coke having been bought by the Smelting Company, undoubtedly belonged to it. This flux was mingled in the smelting process with the mineral, as distinguished from the metal parts of the ore, and made a refuse material, called slag. (Finding 15, rec. p. 73).

Again, in the process of smelting the ore, blasts of air are turned on to the molten mass in the smelter, and this air blast blows not only the smoke, but also fine particles of coke and ore into a stack, all of which is collected in a chamber, and constitutes the flue dust. (Finding 20, rec. p. 76).

If the smelting operation is inefficiently done, nearly all the bullion will run into the slag, and large quantities of undigested particles will be blown into the dust chamber.

According to the theory of counsel for Martin, Trustee, in this case, the Copper Company, after being paid the value of its ore as ascertained by assay sample, before it was smelted at all, is also entitled to recover this slag, although it might contain all the bullion, and the flue dust, although it might contain nearly all the

ore. According to their theory, the Copper Company was entitled to be paid for the ore, and also is entitled to recover the bullion, slag and flue dust into which the ore had been converted. The fallacy of such a contention is too obvious to require consideration.

We have shown that under the contracts and transactions between the Copper Company and the Smelting Company, the ores shipped and delivered to the Smelting Company constituted a sale, and not a bailment; and if this is so, then the title to the ores and to the slag and flue dust into which these ores have been converted, was in the Smelting Company and its Trustee in Bankruptcy, and the lower court erred in holding that the title still remained in the Copper Company, or in Martin, its trustee.

We submit that upon the face of the contracts hereinbefore mentioned, the transaction between the two companies contituted a sale. But if any doubt should arise from the face of these papers themselves, then the construction which the parties themselves have placed upon the transaction, by their course of practice, would be conclusive of the matter.

As is said by the court, in Chisholm vs. Eagle Ore Sampling Company, 75 C. C. A. 472, 144 Fed. 570, supra:

> "It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course

of practice, when no controversy existed, is always to be given very great, if not controlling effect."

Chisholm vs. Eagle Ore Sampling Co., 75 C. C. A., 472, 144 Fed. 570.

And the facts in this case show that the Copper Company always treated the delivery of the ore as a sale; that it never claimed the bullion or the flue dust or the slag, and that no such claim was ever made by anyone until Martin, its trustee in bankruptcy, asserted the same.

We therefore submit, that the delivery of the ores by the Copper Company to the Smelting Company constituted a sale and not a bailment. That upon the delivery thereof the title thereto passed to the Smelting Company and the Smelting Company became the debtor of the Copper Company for the value thereof, as ascertained and determined in each smelter reteurn. And as the title to the ores passed to the Smelting Company, it became, and Freeman, its trustee in Bankruptcy now is, the owner of the flue dust and slag dump, being a part of the ores in its altered form, arising from the converting thereof into copper bullion.

THE MONETARY TRANSACTIONS BETWEEN THE TWO COMPANIES.

The Smelting Company did not keep any bank account with any bank (rec. p. 72). The Copper Company was its banker. It deposited with the Copper Company all moneys it received, no matter from what source received, and received a credit therefor.

And so in paying its bills and accounts, it did not draw a check on any bank, but drew vouchers therefor, and annexed thereto or thereon an order to the Copper Company, requesting it to pay the same and charge the payment to its account. And the Copper Company did pay the same, and did charge the same against the account of the Smelting Company. Each Company, however, kept a separate set of books of account. There was no mingling of funds, and no mixing up of their business affairs. (Findings 13, 14, 15, rec. pp. 72, 73, 74).

On July 5th, 1911, when the petition in bankruptcy against the Copper Company was filed, its own books showed that it had been repaid every dollar which the Smelting Company owed it, except a balance of $26,-887.71, which was in the most part for moneys paid it on orders drawn by the Smelting Company, long after it had ceased to ship any ores to the smelter. (Finding 16, rec. p. 73).

The Smelting Company was adjudicated a bankrupt

in September, 1914. Two years before that date, the trustee in bankruptcy of the Copper Company brought suit against the Smelting Company to recover this balance. (Finding 17, rec. p. 74). And after the Smelting Company was adjudicated a bankrupt, Martin, as trustee in bankruptcy of the Copper Company, filed his claim for this identical balance, as a debt due from the Smelting Company to the Copper Company; again asserting that the Copper Company was a creditor for this amount. (Finding 26, rec. p. 80).

These facts are pertinent to show that Martin, Trustee in Bankruptcy of the Copper Company, himself considered the ore transactions between the Copper Company and the Smelting Company, as constituting a sale or sales, for which a balance of the purchase price is unpaid, which balance he is endeavoring to recover as a debt.

This position is utterly inconsistent with his contention in the present case, wherein he claims the transaction was a bailment. He claims a debt, on the theory that the transaction was a sale; and at the same time he claims the property itself on the theory that the transaction is a bailment. He wants to recover both the goods and the price. And the lower court, by its judgment in this case, has permitted him to do so.

THE SMELTING COMPANY WAS NOT A SUBSIDIARY OF THE COPPER COMPANY.

The lower court, as a conclusion of law, from the facts found by it, held that the Smelting Company was a subsidiary of the Copper Company, and used the Smelting Company as an adjunct, agent and instrumentality in its business.

As the Smelting Company has a separate corporate existence; as Martin, Trustee, is now suing the Smelting Company, through Freeman, its trustee in bankruptcy, as a separate and distinct entity, to recover from him the possession of a part of the assets of the Smelting Company, the only question in this case is as to which of the two bankrupt corporations was the owner of the property in controversy. We fail to see that it is at all material in this case, whether the Smelting Company was or was not, a subsidiary corporation of the Copper Company. That is not a material question in this case.

We might further state, that as the creditors of the Smelting Company lent it credit on the strength of the fact that it did business as a separate entity, and owned its property as a separate entity; and as the claims for these debts have been adjudicated by the court of bankruptcy to be valid claims as against the assets and property of said Smelting Company; and as Martin, trustee, by filing the claim of the Copper Company against the Smelting Company, in the bankruptcy proceedings of

the Smelting Company, has made himself a party to that proceeding, and is bound and estopped by every adjudication therein; both he, as trustee of the Copper Company, and the Copper Company itself, are estopped from claiming that the assets of the Smelting Company do not belong to that Company, and are not applicable to the payment of the debts of the Smelting Company.

However, as counsel for Martin, trustee, argued in the lower court that the Copper Company was the real owner of all the assets of the Smelting Company, and for that reason, and irrespective of any other reason, is the owner of the flue dust and slag, we will show that the Smelting Company was not a subsidiary of the Copper Company; that the Copper Company never was the owner of the property or assets of the Smelting Company; and that there is no merit in this contention.

First as to the facts.

The Copper Company was organized in May, 1903, (rec. p. 43). The Smelting Company was organized in August, 1906. Its organizers were Ben Goodrich, A. N. Gage, Henry Kinsley, J. L. Miller and W. F. Walsh, (rec. p. 44). One of these five men, A. N. Gage, was at the time a director of the Copper Company; the others were not directors of the Copper Company. (rec. p. 46). Therefore, any statement to the effect that either the Copper Company, or its directors, organized the Smelting Company, or caused it to be organized, is not supported by the facts as found by the court and agreed to by the parties.

After the Smelting Company commenced operating in 1907, the following five persons were and remained its officers and directors, to-wit:

E. B. Gage, President.

W. F. Staunton, Vice-President and Gen. Mgr.

A. N. Gage, Secretary and Treasurer.

H. M. Robinson, Director.

F. M. Murphy, Director. (rec. p. 46).

and these five persons were also in 1907 and thereafter, directors of the Copper Company; E. B. Gage being its President, A. N. Gage its Secretary and Treasurer, and W.F. Staunton its Vice-President and General Manager. (rec. p. 46).

Each company, from 1907 on, had practically the same officers and directors.

On December 21, 1908, the Copper Company owned practically all of the issued capital stock of the Smelting Company, amounting to about 9,000 shares. (rec. p. 84). On that day, however, the Copper Company did assign and pledge all these shares of stock to the Bankers Trust Company, as further security for its $2,000,000 of bonds. (Findings 28, 29, rec. pp. 81 and 82), And from that date on, the only interest the Copper Company had in these shares was its right to redeem by paying the debt for which the same stood pledged.

In July, 1911, the Bankers Trust Company brought suit against the Copper Company to foreclose its said lien or pledge on said stock, and thereafter the lien was foreclosed by the decree of the State Court, and the shares were ordered sold; the same were sold to Leo Goldschmidt; the sale was confirmed by the court; and Leo Goldschmidt became, and he and his assigns now are, the owners of all these shares of stock. (Findings 36, rec. p. 90).

The assets of a corporation belong to its stockholders, subject only to the payment of the corporate debts.

The assets of the Smelting Company belong therefore, to its stockholders, namely, Leo Goldschmidt and his assigns, subject only to the payment of the corporate debts.

The Smelting Company has been adjudicated a bankrupt. Its assets, therefore, are being administered by its trustee in bankruptcy for the benefit of its creditors; and these creditors have filed and had allowed claims aggregating over $60,000.

The first moneys realized from the sale of these assets must be paid to the creditors whose claims have been filed and allowed, after taxes and administration expenses are paid.

But, if after these costs and the claims of the creditors are paid in full, a balance of assets or money should remain in the hands of the trustee in bankruptcy, to whom would those remaining assets belong? Clearly,

to the stockholders of the Smelting Company; that is, to Leo Goldschmidt and his assigns, who are the stockholders.

But the learned counsel for Martin, Trustee, argued in the lower court, and it is fair to presume they will argue in this court, that those remaining assets will belong to Martin, as trustee of the Copper Company, because the Copper Company once owned the stock.

And because the Copper Company once did own this stock, they will claim that the Smelting Company was a subsidiary corporation of the Copper Company, its agent and instrumentality, and ever since has so remained. They will assert, that although the Copper Company assigned and pledged that stock as security for a debt, which debt has never been paid; that although the pledge has been foreclosed by sale, and the stock sold and paid for by a third party, nevertheless, the Copper Company, or its trustee in bankruptcy, is the owner of the assets which are represented by that stock.

And they will further assert, as they did in the court below, that although neither the Copper Company, nor Martin, its trustee in bankruptcy, owns one share of the capital stock of the Smelting Company, nevertheless, the Copper Company, or Martin, as its Trustee, owns the Smelting Company itself, and all its assets. They will further assert, as they did in the court below, that Leo Goldschmidt and his assigns, who by purchase of the stock at foreclosure sale, became the owner of all the right, title and interest which the Copper

Company owned therein, on the 21st day of December, 1908, when it pledged the stock to the Bankers Trust Company, is not the owner of the assets of the corporation whose capital stock he purchased; that those assets do not belong to the stockholders but do belong to the Copper Company, because it once did own that stock.

Such a contention seems too absurd to merit any consideration. But it was urged upon the court below; and we presume it will be urged before this court.

The lower court found as a fact: That on December 21, 1908, the Copper Company, then being the owner of practically all the issued capital stock of the Smelting Company did assign and pledge the same to the Bankers Trust Company as security for a debt. (Finding 29, rec. p. 82); that the Bankers Trust Company caused this stock to be transferred to itself on the books of the Smelting Company, before bankruptcy proceedings were instituted against the Copper Company. (Finding 29, rec. p. 82).

So then, at the time the petition to have the Copper Company adjudged a bankrupt was filed, the Bankers Trust Company stood upon the books of the Smelting Company, as the owner of the stock, and the Copper Company did not stand as such owner.

The right of the Copper Company to redeem this stock by paying the debt for which it was pledged as security, is conceded. This right was recognized by the Bankers Trust Company, when on July 3, 1911, it

brought suit against the Copper Company to foreclose the pledge or lien.

But the Copper Company did **not** redeem its pledge. On the contrary it failed to do so, and in the foreclosure suit the stock was decreed to be sold by the court, and the stock was sold under this decree, and all the right and interest of the Copper Company thereto was forever barred and ended. (Finding 34, rec. p. 87).

The purchaser of the stock at that foreclosure sale necessarily purchased all the right, title and interest thereto and therein, which the Copper Company had on December 21, 1908, the day when it pledged the same. And if, o nthat day, the Copper Company, by virtue of being the owner of that stock, was the owner of the assets of the Smelting Company, then those assets passed to the purchaser of the stock at the foreclosure sale.

If the Smelting Company was a subsidiary corporation of the Copper Company on December 21, 1908, by virtue of the Copper Company owning all the capital stock of that company on that day, then, when the Copper Company pledged that stock, it pledged all the assets represented by that stock. And the foreclosure of the pledge and the sale of the stock thereunder, vested the purchaser with all the rights to the assets of the Smelting Company which on December 21, 1908, the Copper Company had.

We cannot conceive how anyone can claim, that because a parent corporation is the real owner of the as-

sets of a subsidiary corporation by reason of its owning all the stock of such subsidiary corporation; it continues to be such parent corporation and the owner of all the assets of the subsidiary corporation, after it has sold and no longer owns the stock of such subsidiary corporation.

One corporation can only be subsidiary to another corporation when all its stock is owned by such other corporation. When the parent corporation parts with that stock, the new stockholders have control of the subsidiary corporation. It is no longer a subsidiary corporation to the other corporation, for that other corporation has no control over it, and no interest in the assets represented by its stock.

We will not pursue this discussion further. We will leave it to the learned counsel for Martin, Trustee, to explain to this court upon what principle of law or justice one corporation can be held to be the subsidiary of another corporation, when that other corporation does not own one share of its capital stock.

THE STATUTE OF LIMITATIONS

The Smelting Company, by George W. Dietz, its Secretary and acting manager, took possession of said flue dust and slag, on August 15, 1910, claiming ownership and right of possession thereof, and from that date down to the 31st day of October, 1914, when said Smelting Company delivered possession of said property to M. P. Freeman, its trustee in bankruptcy, a period of four years, two months and sixteen days, the Smelting Company has remained in possession of said property, claiming the ownership thereof. (Finding 21, rec. p. 77).

If this flue dust and slag dump was the property of the Copper Company, then the Smelting Company, by taking possession thereof and claiming it as its property, was guilty of conversion or other wrongful appropriation of the property of the Copper Company, and the Copper Company had a cause of action against it.

That cause of action accrued on August 15, 1910. But no suit was commenced upon this cause of action until 1915, more than four years after the cause of action accrued, and therefore, the cause of action against the Smelting Company, and against its trustee in bankruptcy, for the recovery of that property, is barred by the provisions of sections 710 and 716 of the Revised Statutes of Arizona of 1913.

The sections of the statutes of Arizona referred to, are as follows:

"710. There shall be commenced and prosecuted within **two** years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:.....

(3) Actions for detaining the personal property of another and for converting such personal property to one's own use.

(4) Actions for taking or carrying away the goods and chattels of another."

Sec. 710 Revised Statute of Arizona of 1913.

> "716. Every action other than for the recovery of real estate for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward."
>
> Sec. 716 Revised Statute of Arizona of 1913.

The present suit of Martin, Trustee, is barred by the statute of limitations which was duly pleaded, (rec. p. 17) and for that reason also the court erred in adjudging the property in dispute to be the property of the Copper Company, or its trustee in bankruptcy.

RESUME.

We therefore submit:

1. That as the contract under which the Copper Company delivered its ores to the Smelting Company constituted a contract of sale, and not a contract of bailment, the title to those ores passed to the Smelting Company, and those ores in their original or in their altered form of bullion, flue dust and slag, became the property of the Smelting Company.

2. That the contract between the two Companies, in regard to the delivery and smelting of the ore, was a completed and executed contract, before the Copper Company was adjudicated a bankrupt. All the ores had been delivered; all had been sampled and assayed; the total value thereof, as agreed upon by the parties and shown by the assay returns, had been charged as a debt or debts due from the Smelting Company; all the ores had been smelted; all the bullion had been sold, and the entire debt due from the Smelting Company to the Copper Company, except a comparatively small balance, had been paid. Therefore, those ores, in their original or altered form, became and were the property of the Smelting Company.

3. The claim of Martin, Trustee, that the Copper Company, or he, as its trustee, is the owner of those ores, or any of them, either in their original form as ores, or in their altered form as flue dust and slag, is ut-

terly without merit, and the judgment of the lower court decreeing him to be the owner and entitled to the possession thereof is erroneous and should be reversed.

4. And in any event, the right of action of the Copper Company, and of its trustee in bankruptcy, to recover said ores, in their altered form as flue dust and slag, is barred by the statute of limitations, for the reason that this right of action arose in August, 1910, and the present suit was not brought until 1915, over four years after the cause of action arose.

We, therefore, ask, that the judgment and decree in this case be reversed, and the case be remanded with directions to the lower court to enter judgment and decree in favor of M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, and as prayed for in his Answer herein.

Respectfully submitted,

SELIM M. FRANKLIN,

ELLINWOOD & ROSS,

Attornies for M. P. Freeman,
Trustee, etc., Appellant.